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## Business Torts

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# BUSINESS TORTS

*Charles M. Hosch\**

*Lauren T. Becker\*\**

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## I. TRADE SECRETS AND CONFIDENTIAL INFORMATION

### A. TRADE SECRETS AND DEPARTING EMPLOYEES

**H**ARDLY a day goes by without at least one new suit being filed alleging misappropriation of trade secrets, typically from a former employer. Many of these suits follow a familiar pattern, focusing on what the former employer claims are its trade secrets and including many related causes of action. Several recent cases provide an instructive and useful contrast—sometimes amounting to roadmaps of what an employee should *not* do when preparing to open her own competing enterprise and other times illustrating what may lawfully be done in fair and proper competition.

In *Pearson v. Visual Innovations Co.*,<sup>1</sup> it would appear that before Mr. Pearson resigned his employment, he aggressively prepared to compete with it. While still employed by his former employer, he had “numerous” conversations with two major clients about transferring their business and received “verbal assurances” that they would do so; he negotiated contracts with them based on his former relationship and dealings with them;

1. No. 03-04-00563-CV, 2006 Tex. App. LEXIS 2795 (Tex. App.—Austin Apr. 6, 2006, pet. denied).

and, once his new entity was in operation, he received all of its revenue from former clients of his former employer.<sup>2</sup> Before he resigned, he also downloaded copies of many files from his former employer, deleted them from his company computer, and saved them on his home computer. It was alleged he also deleted client records and “thousands” of emails, and destroyed the signed original noncompetition covenants of several employees, including some who went to work for him. It was also alleged that he took equipment with him, though what equipment he took was not specified.<sup>3</sup>

In these circumstances an injunction was issued, but Pearson’s appeal of it was mooted by the time of the appeal because the injunction had already expired.<sup>4</sup> Pearson’s appeal was focused entirely on the validity of his noncompetition covenant. The Austin Court of Appeals held that the noncompetition covenant was valid. Consequently Mr. Pearson’s objections as to the trial court’s judgment finding him liable for fraud, breach of fiduciary duty, misappropriation of trade secrets, and tortious interference were waived, and the judgment was affirmed.<sup>5</sup>

*RenewData Corp. v. Strickler*<sup>6</sup> provided more illustrative examples but in a markedly different context. In this case, the allegedly wrongful acts appear to have occurred after the former employee left, rather than before. Here, Strickler was director of corporate sales services. He was subject to covenants regarding noncompetition, confidentiality, non-solicitation of the former employer’s clients for one year, and a commitment to return the former employer’s company documents. He was terminated on a Friday. On the following Monday, he e-mailed one of his former employer’s competitors, asking to discuss job opportunities. A week later he called his former supervisor and asked if it “minded” if he went to work for one of his unspecified partners, but the former supervisor did not commit. Strickler and the competitor made an agreement, and he wrote his former employer, letting him know that he had accepted this new position and would begin work shortly afterward.<sup>7</sup>

On Strickler’s first day in his new position, his new employer advised him to seek legal advice as to his relationship with his former employer and his new job but also asked him to document his goals and say “who the immediate easy money targets are.”<sup>8</sup> The new company made clear that its goal was for Strickler to bring in “NEW business” (emphasis in original), and admitted that it did not specifically do anything to make

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2. *Id.* at \*4.

3. *Id.* at \*5–6.

4. *Id.* at \*9 (citing *NCAA v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999) (“when injunction becomes inoperative due to passage of time, issue of its validity becomes moot, and appellate court decision about injunction’s validity under such circumstances would constitute impermissible advisory opinion”)).

5. *Id.* at \*22–23.

6. No. 03-05-00273-CV, 2006 WL 504998 (Tex. App.—Austin Mar. 3, 2006, no pet.) (mem. op., not designated for publication).

7. *Id.* at \*1–2.

8. *Id.* at \*3.

sure Strickler was not contacting customers who had been customers of his former employer.<sup>9</sup> The facts were less distinct or direct than is often the case, but there was evidence in the form of an e-mail that Strickler knew enough about his former employer's pricing to characterize a particular bid of his former employer as "playing dirty."<sup>10</sup> The email also characterized Strickler's efforts to draw clients from his former employer as "subtly pointing out"<sup>11</sup> things his new employer could do that his former employer could not. Strickler also knew enough about the former employer to specifically address pricing adjustments.<sup>12</sup> From these facts, the Austin Court of Appeals concluded there was more than a scintilla of evidence supporting a finding that Strickler disclosed proprietary information and affirmed the jury's verdict in that regard.<sup>13</sup>

Strickler apparently sent one or more e-mails to companies with whom he had worked while with his former employer, and one did follow him, leading to a \$2,500 commission for Strickler.<sup>14</sup> There was also evidence that Strickler had a company document, which he characterized as a Fortune 1000 list in his personal e-mail, but Strickler did not search his e-mail until he responded to requests for production. The court of appeals held that this was a breach of his contractual obligation to return company documents upon departure, even if he did not remember that he had them.<sup>15</sup>

Strickler argued his actions were merely "healthy competition,"<sup>16</sup> and certainly many cases present more compelling proof of liability. But the court of appeals concluded there was sufficient evidence of "wrongful act[s]" to support the judgment, including Strickler's

plan to share his knowledge of [his former employer's] business and technology . . . , failure to return a document belonging to [his former employer] when he left . . . , an e-mail to his former client "encouraging a call to assist with its 'opportunities,'" "subtly pointing out" to [a client] things his new employer could offer that [his former employer] could not, lack of elaboration to [his new employer] about what particular information he was sharing, authorization to "play around with" a spreadsheet for [his new employer's] re-bidding purposes, inclusion in a meeting on pricing adjustments to [the new client's project], and descri[bing] his former employer's] business conduct as 'playing dirty.'<sup>17</sup>

Conflicting evidence led to a different result in *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*<sup>18</sup> There, a former em-

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9. *Id.* at \*8.

10. *Id.* at \*15.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at \*3.

15. *Id.* at \*9.

16. *Id.* at \*15.

17. *Id.*

18. 190 S.W.3d 891 (Tex. App.—Dallas 2006, no pet.).

ployer alleged that certain doctors had misappropriated confidential information, tortiously interfered with business relationships, and tortiously interfered with other employees' duties of loyalty when they left to start their own practice. The trial court initially granted a temporary restraining order against the departing employee-physicians but later modified it. The trial court then dissolved the modified order and refused to grant a temporary injunction.<sup>19</sup>

The Dallas Court of Appeals held that in view of the conflicting evidence and the fact that there was some evidence to support the trial court's decision, the trial court did not abuse its discretion in declining to issue a temporary injunction.<sup>20</sup> The court of appeals affirmed the trial court's order.<sup>21</sup> To support its decision, the court of appeals noted the presence of some defensive evidence: the fact that only patient information was marked confidential, as opposed to the documents which were circulated at meetings and not retrieved when the meetings ended; when recruiting other doctors, the former employer did not ask the recruits to sign confidentiality agreements and freely shared information relating to the surgeons they worked with, whom they preferred, their most important clients, and annual revenues and income; and when the departing doctors left, they were not asked to return confidential information.<sup>22</sup>

#### B. CONFIDENTIALITY CLAUSES: NOT A BREACH TO SAY WHO WANTED IT?

Many contracts, specifically in settlement agreements, include "confidentiality" provisions that address the parties' intent to keep aspects of their agreement confidential. *Christenberry v. Webber*<sup>23</sup> presented the interesting issue of whether the identity of the party that proposed (or insisted on) including the confidentiality provision in an agreement may itself be confidential.

In the circumstances of this case, the Houston Court of Appeals for the First District held that the agreement indicated that the identity of the party who wanted the terms kept confidential could be disclosed.<sup>24</sup> Accordingly, it was not a breach of the settlement agreement to reveal which party wanted the substantive terms to be kept confidential.<sup>25</sup>

Of course, if such information about the negotiations leading up to the final agreement is not included within the terms of a confidentiality provision, it may be reasonable to ask what *else* about the negotiations—such as *why* a party wanted certain terms or topics kept confidential, or how

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19. *Id.* at 893–94.

20. *Id.* at 898.

21. *Id.*

22. *Id.* at 897.

23. No. 01-04-00109-CV, 2006 Tex. App. LEXIS 1142 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

24. *Id.* at \*19.

25. *Id.* at \*20.

urgently the party wanted it—may also be revealed without breach. Confidentiality agreements should be considered with this in mind.

C. COMPUTER FRAUD AND ABUSE ACT:  
A PRIVATE RIGHT OF ACTION

The Computer Fraud and Abuse Act<sup>26</sup> criminalizes fraud and abuse that occurs using computers. But it also authorizes private, civil actions for some, though not all, violations of its provisions. In *Fiber Systems International, Inc. v. Roehrs*,<sup>27</sup> the Fifth Circuit defined what must be required to be shown in order to trigger civil liability.

The substantive provision at issue was 18 U.S.C. § 1030(a)(4), which “prohibits the ‘knowing [ . . . ] access [of] a protected computer without authorization,’ with intent to defraud, if ‘such conduct furthers the intended fraud and [the violator] obtains anything of value.’”<sup>28</sup> Section 1030(g) of the act provides that “any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief,” but it further requires that “[a] civil action for violation of this section may be brought only if the conduct involves [one] of the factors set forth in” at least one of clauses (i) through (v) of § 1030(a)(5)(B).<sup>29</sup> Those factors are

(i) loss to 1 or more persons during any 1-year period [ . . . ] aggregating at least \$5,000 in value; (ii) [impairment of] medical examination, diagnosis, [or] treatment [ . . . ]; (iii) [physical injury]; (iv) [threat to public health or safety]; or (v) [damage to a computer system used by the government for the] administration of justice, national defense, or national security.<sup>30</sup>

Here, the jury found the defendant had violated section 1030(a)(4).<sup>31</sup> The Fifth Circuit found that this violation, when combined with one or more of the factors set out in Section 1030(a)(5)(B)(i)–(v), was enough to support civil liability.<sup>32</sup> The jury also found that the plaintiff *falsely* accused the defendants of being “thieves,” however, so the Fifth Circuit concluded that the “value” the defendants must have obtained unlawfully could not have been stolen trade secrets.<sup>33</sup>

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26. 18 U.S.C. § 1030 (2007).

27. 470 F.3d 1150 (5th Cir. 2006).

28. *Id.* at 1156 (quoting 18 U.S.C. § 1030(a)(4)).

29. 18 U.S.C. § 1030(g).

30. 18 U.S.C. § 1030(a)(5)(B)(i)–(v).

31. *Fiber Sys. Int'l*, 470 F.3d at 1159.

32. *Id.*

33. *Id.*

## II. BUSINESS DISPARAGEMENT AND PERSONAL DEFAMATION

### A. INADEQUATE INVESTIGATION AND QUALIFIED PRIVILEGE

Physicians who receive unfavorable peer reviews and are then denied staff privileges at hospitals face an uphill struggle to establish tortious interference or defamation claims.<sup>34</sup> Particularly, under Section 160.010 of the Texas Occupations Code, healthcare entities and medical peer review committee members are immune from liability so long as they act without malice.<sup>35</sup> “Malice” is defined as “the specific intent . . . to cause substantial injury or harm to the claimant.”<sup>36</sup>

In *Kinnard v. United Regional Health Care System*, a retired physician was denied privileges to return to practice at a hospital. The committee’s affidavits showed committee members acted without malice. To controvert the affidavits and raise a fact question on the issue of malice, “Dr. Kinnard was required to present evidence that [defendants] had a specific intent to cause substantial injury or harm to him.”<sup>37</sup>

Dr. Kinnard claimed the peer review committee conducted an inadequate investigation. Only one member reviewed his application, and that member never worked with Dr. Kinnard, watched him operate, or talked to any of his patients. Dr. Kinnard also asserted the committee had ulterior motives, though none were specified.<sup>38</sup> But he did not have evidence that the defendants had a specific intent to cause substantial injury or harm to him.<sup>39</sup> This absence ultimately was fatal to Dr. Kinnard’s claim. “Mere evidence that [defendants] did not conduct an adequate investigation and had ulterior motives,” the Fort Worth Court of Appeals held, “is not sufficient to establish such an intent.”<sup>40</sup>

Oddly though, the court of appeals also cited *Poliner v. Texas Health Systems*.<sup>41</sup> In *Poliner*, the United States District Court for the Northern District of Texas denied a hospital’s summary judgment motion on a doctor’s defamation claim, based on an unfavorable peer review, and held that evidence of inadequate investigation, coupled with ulterior motives, was sufficient to raise a fact issue of whether a qualified privilege existed.<sup>42</sup> These seemingly contradictory holdings are difficult to reconcile.

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34. See *Kinnard v. United Reg’l Health Care Sys.*, 194 S.W.3d 54, 57 n.7 (Tex. App.—Fort Worth 2006, pet. denied) (citing numerous cases).

35. *Id.* at 57.

36. *Id.* at 57–58 (citing *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 214 n.2 (Tex. 2005) (itself citing Tex. Civ. Prac. & Rem. Code Ann. § 41.001(7) (Vernon 2004–05) “and the revised ‘malice’ definition, which applies to all actions seeking recovery of ‘damages’”)).

37. *Id.* at 58.

38. *Id.*

39. *Id.*

40. *Id.* (citing *Romero*, 166 S.W.3d at 214 n.2).

41. No. 3:00-CV-1007-P, 2003 U.S. Dist. LEXIS 17162 (N.D. Tex. Sept. 30, 2003) (mem. op.); see *id.*

42. *Poliner*, 2003 U.S. Dist. LEXIS 17162, at \*54–55 (citing *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 315 (5th Cir. 1995)).



### B. SUBPOENAS DIRECTED TO AN OPPONENT'S CUSTOMERS

Experienced litigants expect to be aggravated over the course of a lawsuit, with its costs, discovery demands, and so on. They also know that if there is anything worse than having those burdens placed on themselves, it is having them placed on their customers by way of a third-party subpoena for documents, deposition testimony, or both.

Third-party subpoenas directed to customers were at issue in *Intel Corp. v. Intel-Logistics, Inc.*<sup>43</sup> There, the defendant whose customers were subpoenaed brought a counterclaim for business disparagement, not alleging any particular false statements in the subpoenas themselves, but alleging instead that filing the lawsuit in the first place and issuing the subpoenas themselves constituted tortious interference and business disparagement. The United States District Court for the Southern District of Texas held these statements absolutely privileged and dismissed the counterclaim, holding that "Texas law allows absolute privilege or immunity for a communication that is related to [a judicial proceeding]." <sup>44</sup>

### C. THE DIFFERENCE BETWEEN A "CROOK," A "THIEF," AND A "MISAPPROPRIATOR"

In *Fiber Systems International, Inc. v. Roehrs*,<sup>45</sup> the Fifth Circuit also considered the nuances of differences which may lie between outright "thieves," mere "crooks," and, in an interesting footnote, misappropriators of intellectual property.<sup>46</sup> In the proper case, the distinction may be significant. As the Fifth Circuit noted, Texas law provides "extensive precedent holding that a false accusation of theft is defamatory per se," requiring no proof that the statement caused injury in order to be actionable.<sup>47</sup> Here there was some dispute as to whether the plaintiff called the counter-claiming defendant a "thief," although no dispute over the term "crook," in the highly contentious context of two brothers' battle over ownership of a company and its various confidential materials.<sup>48</sup> The Fifth Circuit affirmed the lower court's judgment based on the jury's verdict of defamation but not without an interesting discussion of how Texas courts view the terms "crook," "thief," and other names.<sup>49</sup>

According to the Fifth Circuit, Texas case law "firmly establishes that falsely accusing someone of stealing or calling someone a 'thief' constitutes defamation per se."<sup>50</sup> The Fifth Circuit also concluded, however, that "Texas courts have determined that the term 'crook' does not inher-

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43. No. H-05-2255, 2006 U.S. Dist. LEXIS 34361 (S.D. Tex. May 30, 2006).

44. *Id.* at \*3 (citing *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912-13 (Tex. 1942)).

45. 470 F.3d 1150 (5th Cir. 2006).

46. *Id.* at 1163, 1163 n.9.

47. *Id.* at 1162.

48. *Id.*

49. *Id.* at 1162-64.

50. *Id.* at 1162 (citations omitted).

ently have the same defamatory content.”<sup>51</sup> In *Moore v. Waldrop*, the Waco Court of Appeals held that the phrase “[y]ou don’t want to hire him, he’s a crook,” was not actionable; it concluded that the word “crook,” standing alone, was merely a term of general disparagement and not one that imputed a specific crime.<sup>52</sup> In *Billington v. Houston Fire & Casualty Insurance Co.*,<sup>53</sup> the Fort Worth Court of Appeals held that “liar” and “crook” were not defamatory because they were used only as opprobrious terms.<sup>54</sup> Evidently the Fifth Circuit agreed that calling someone a “thief” much more directly imputes a crime than merely calling the person a “crook.”<sup>55</sup> Still, the Fifth Circuit added that calling someone a “crook” may also constitute defamation per se, if it is used in a context which imputes theft.<sup>56</sup>

It would appear that where the accusatory language is less specific, the context in which the words are spoken takes on even greater importance. In this case, the Fifth Circuit held that, in order to affirm the district court’s judgment, it would be sufficient if “the words used [were] reasonably capable of a defamatory meaning.”<sup>57</sup> In answering this question, “the court must construe [each] statement as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement.”<sup>58</sup> The surrounding circumstances “are the setting in which the allegedly slanderous statement is spoken, consisting of the context of the statement and the common meaning attached to the statement.”<sup>59</sup> Here, the Fifth Circuit concluded that the words used, in light of the surrounding circumstances, did directly impute specific crimes under Texas law.<sup>60</sup>

In an interesting footnote, the Fifth Circuit noted that this left “unaddressed whether [a statement] that defendants ‘misappropriat[ed] . . . intellectual property’ constituted defamation. We note, however, that Texas law defines a thief as, in part, someone who ‘unlawfully appropriates property.’”<sup>61</sup> Though not definitive, the note suggests the Fifth Circuit might indeed view such a phrase as directly imputing a crime sufficient to trigger liability for defamation per se.

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51. *Id.* at 1162 (citing *Moore v. Waldrop*, 166 S.W.3d 380, 384 (Tex. App.—Waco 2005, no pet.)).

52. *Id.* (citing *Moore*, 166 S.W.3d at 383–84).

53. 226 S.W.2d 494 (Tex. Civ. App.—Ft. Worth 1950, no writ).

54. *Fiber Sys. Int’l*, 470 F.3d at 1162 (citing *Billington*, 226 S.W.2d at 496).

55. *Id.* at 1162.

56. *Id.* at 1162 (citing *Bennett v. Computer Assocs. Int’l, Inc.*, 932 S.W.2d 197, 200 (Tex. App.—Amarillo 1996, writ denied) (“falsely calling someone a ‘crook’” was defamatory per se when the defendant called the plaintiff “a ‘thief’ and a ‘crook’ who had stolen . . . computer software”)).

57. *Id.* at 1163 (citing *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654–55 (Tex. 1987)).

58. *Id.* at 1163 (citing *Gray v. HEB Food Store No. 4*, 941 S.W.2d 327, 329 (Tex. App.—Corpus Christi 1997, writ denied)).

59. *Id.* (citing *Moore*, 166 S.W.3d at 386).

60. *Id.* at 1163.

61. *Id.* at 1163 n.11 (citing Tex. Penal Code Ann. § 31.03 (Vernon 2005)).

## III. TORTIOUS INTERFERENCE

## A. INTENT TO INTERFERE AND "MALICE"

Like nearly all business torts, tortious interference (either with existing contracts or with prospective contracts) is an "intentional" tort and requires a showing that the actor intended to interfere. What constitutes the requisite "intent," however, is often elusive.

This issue was explored in *Shields v. Delta Lake Irrigation District*.<sup>62</sup> After a disagreement arose between a land-owning lake district and some developers who leased some of the land, the lake district began negotiations with a different set of developers. The first developers brought suit against the district and against some sub-lessees who had intervened. Claims of tortious interference, both with existing contracts and with prospective contracts, were included.<sup>63</sup>

In describing the elements of a claim for tortious interference with a prospective contract, the Corpus Christi Court of Appeals cited to its own cases which describe one element of the claim as "an intentional and malicious act by the defendant that prevented the relationship from occurring[. . . ]."<sup>64</sup> "Intent is established," the court held, "if there is direct evidence that [the defendants] desired to interfere or if they knew that the interference was certain or substantially certain to occur as a result of their conduct."<sup>65</sup> This seems straightforward enough until it is considered that the defendant-actor may have in mind an entirely separate, lawful purpose of its own—not specifically hoping or even intending that it harm the plaintiff in the process but knowing full well that harm to the plaintiff would certainly result. For such cases, the court of appeals also cited *Bradford v. Vento* for the contrasting proposition that "if [defendants] had no desire to interfere with [plaintiff's] action but knew that it would be a mere incidental result of conduct for another purpose, any interference may not be improper."<sup>66</sup>

It is not always easy to reconcile the principle that intent is established when a certain desire or certainty of result is present with the principle that an interference may not be "improper" when it is a "mere incidental result of conduct for another purpose," even though the actor knows it will harm the plaintiff.<sup>67</sup> Though not expressly stated in this or other cases, this heavily fact-specific issue often seems to turn, in an undefined way, on questions of subjective malice. Notice the court's emphasis on the defendant-actor's "desire"<sup>68</sup>—either to bring about the interference

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62. No. 13-01-622-CV, 2006 Tex. App. LEXIS 4082 (Tex. App.—Corpus Christi May 11, 2006, pet. denied) (mem. op.).

63. *Id.* at \*1–4.

64. *Id.* at \*46 (citing *Larson v. Family Violence & Sexual Assault Prevention Ctr.*, 64 S.W.3d 506, 517 (Tex. App.—Corpus Christi 2001, pet. denied)); *Garner v. Corpus Christi Nat'l Bank*, 944 S.W.2d 469, 477 (Tex. App.—Corpus Christi 1997, writ denied).

65. *Id.* at \*46–47 (citing *Bradford v. Vento*, 48 S.W.3d 749, 757 (Tex. 2001)).

66. *Id.* at \*47 (citing *Bradford*, 48 S.W.3d at 757).

67. *Id.*

68. *Id.*

or to accomplish some other purpose to which the interference was merely incidental. With respect to the elements of tortious interference with prospective contracts, the court of appeals expressly held that the act must be intentional and “malicious,”<sup>69</sup> while acts of tortious interference with existing contracts must be “wilful and intentional.”<sup>70</sup> Here, the court of appeals held there was no evidence to support that the defendants-actors “acted with the requisite intent *and malice* for the *specific* purpose of harming the [intervenors].”<sup>71</sup>

While the substantive result is probably correct due to the apparent lack of probative summary judgment evidence produced at the trial level, it is curious that the court of appeals did not cite the seminal Texas Supreme Court case on tortious interference with prospective contract, *Wal-Mart Stores, Inc. v. Sturges*.<sup>72</sup> In *Sturges*, the supreme court removed “malice” altogether as an element of the cause of action in favor of a bright-line rule requiring the defendant-actor’s conduct to have been “independently tortious or wrongful.”<sup>73</sup> “Malice” never was an element of tortious interference with existing contract, at least not explicitly.<sup>74</sup> It may be, however, that the court of appeals’ explanation provides a clearer insight, than perhaps even it expected, into what is really required—less as a doctrinal matter than as a practical one—in order to distinguish a true claim for tortious interference from a non-actionable, “merely incidental result” of a defendant-actor going about its lawful business. In this context, recall the famous example of the walrus in *Through the Looking Glass*, who protested—as he walked down the beach, picking up oysters and eating them—that he never meant to harm the oysters. He only meant to eat them.

#### B. SUMMARY JUDGMENT AS TO “INTENT” IN TORTIOUS INTERFERENCE CASES

“Intent” that some result will occur, or a “substantial certainty” that some result will occur, is difficult to show and can be heavily fact-specific which may mitigate against deciding such matters on summary judgment. In *Lunn v. Fragomen, Del Rey, Bernsen and Loewy, P.C.*,<sup>75</sup> however, the United States District Court for the Southern District of Texas reflected that summary judgment may be appropriate “even in instances where such elusive concepts as motive or intent are at issue if the nonmoving party rests merely on conclusory allegations, improbable inferences, and/or unsupported speculation.”<sup>76</sup> In this case, the nonmoving party offered “no evidence from which it [could] be inferred that Defendants knew—let

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69. *Id.* at \*46.

70. *Id.* at \*47.

71. *Id.* at \*48 (emphasis added).

72. 52 S.W.3d 711 (Tex. 2001).

73. *Id.* at 726.

74. See *Juliette Fowler Homes, Inc. v. Welch Assocs.*, 793 S.W.2d 660, 665 (Tex. 1990).

75. No. H-04-404, 2006 U.S. Dist. LEXIS 11160 (S.D. Tex. Feb. 28, 2006).

76. *Id.* at \*28 (citing *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994)).

alone were substantially certain—that [Defendant's] disclosure would cause [the employer] to terminate [plaintiff's] employment.”<sup>77</sup> Consequently the district court granted summary judgment on the tortious interference claim.<sup>78</sup>

C. IS “BLACKLISTING” TORTIOUS INTERFERENCE?  
AN OPEN QUESTION

In *Brim v. Exxon Mobile Pipeline Co.*,<sup>79</sup> the plaintiffs worked for an Exxon entity whose crude oil assets were about to be sold to another oil company. Apparently Exxon and the buyer expected the buyer to hire many of the Exxon employees who would be affected. Therefore, before the Exxon employees whose jobs were being “sold” could obtain severance packages from Exxon, they would have to both apply for, and be rejected from, jobs with the buyer. Exxon was supposed to give the buyer a list of employees who worked directly with the crude oil assets being sold, and the buyer was to confine its hiring offers to persons on that list.<sup>80</sup>

The plaintiffs were left off the list, meaning they were neither eligible for hire by the other oil company, nor eligible for severance packages from Exxon. Among other claims, they claimed this constituted “blacklisting”<sup>81</sup> in violation of Section 52.031 of the Texas Labor Code as well as tortious interference with their prospective relationship with the other oil company. A person violates Texas Labor Code Sec. 52.031 “if the person (1) blacklists or causes to be blacklisted an employee; or (2) conspires or contrives by correspondence or in any other manner to prevent an employee discharged by a corporation, company, or individual from procuring employment.”<sup>82</sup> The plaintiffs claimed this “blacklisting” would also constitute the “independently tortious” conduct, *i.e.*, conduct “that would violate some other recognized duty,” required under *Sturges*, to support a claim for tortious interference with prospective relationships.<sup>83</sup>

Two federal trial courts—the U.S. Magistrate Judge, and the U.S. District Judge accepting the Magistrate Judge’s recommendation—considered Exxon’s arguments that Section 52.031 of the Texas Labor Code requires that an employee first be discharged as a prerequisite to any relief and, therefore, does not provide a private right of action anyway.<sup>84</sup> Both the claims for tortious interference and for “blacklisting” arose under Texas law, and in the courts’ view raised issues “that have not been definitely addressed by the Texas courts.”<sup>85</sup> Accordingly, and especially

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77. *Id.* at \*28–29.

78. *Id.*

79. No. MO-05-CV-018-XR, 2006 U.S. Dist. LEXIS 27155 (W.D. Tex. Apr. 3, 2006).

80. *Id.* at \*3–4.

81. *Id.* at \*5.

82. *Id.* at \*5–6.

83. *Id.* at \*4–6 (citing *Sturges*, 52 S.W.3d at 713).

84. *Id.* at \*6.

85. *Id.*

considering that little additional cost or inconvenience would be involved, the courts concluded that “the principles of comity and federalism dictate[d] that dismissal without prejudice [was] warranted,” so the claims could readily be brought and decided in Texas state court.<sup>86</sup> Guidance on that interesting question must await its progress through the state courts.

#### D. INACTION (FAILURE TO RESPOND) NOT TORTIOUS INTERFERENCE

In *Sanitec Industries Inc. v. Micro-Waste Corp.*,<sup>87</sup> the plaintiff complained not only of what the defendant had done, but also what it had failed to do: namely, respond to numerous inquiries about a certain license agreement.<sup>88</sup> The plaintiff claimed that the defendant’s failure to respond constituted a tortious interference with plaintiff’s relationship with a third party. The United States District Court for the Southern District of Texas concluded that “such inaction as a matter of law is not tortious interference.”<sup>89</sup> Tortious interference, it concluded, requires “a willful and intentional act of interference,”<sup>90</sup> and there was no authority for the proposition that a failure to act could constitute such a willful and intentional act, particularly “where, as here, there was no evidence the defendant had any duty to act.”<sup>91</sup> The district court cited several cases pointing out the need to show an alleged interference as opposed to sitting on one’s hands.<sup>92</sup> The case might be different if circumstances had been present indicating the defendant did have a duty to act.

#### E. CAUSATION IN TORTIOUS INTERFERENCE CASES

In *Johnson v. Baylor University*,<sup>93</sup> Vernon Johnson was a pilot for Baylor University. Baylor fired Johnson “for chronic obesity and poor grammar and diction,”<sup>94</sup> which Baylor felt reflected poorly on its image. Speech and appearance notwithstanding, Johnson was evidently a good pilot, at least according to Baylor’s then president. When Johnson looked for a new job with an airline, a background report, prepared by a third party from information obtained from Baylor, indicated Baylor had fired Johnson for misconduct, and he was ineligible for rehire. When the airline sought copies of Johnson’s personnel records directly from Baylor, Baylor erroneously responded that they were not available. As a result,

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86. *Id.* at \*6–7.

87. No. H-04-3066, 2006 U.S. Dist. LEXIS 36460 (S.D. Tex. June 2, 2006).

88. *Id.* at \*18.

89. *Id.* at \*20.

90. *Id.* at \*19 (citing *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996)).

91. *Id.*

92. *Id.* at \*19–20 (citing *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993) (requires evidence of defendant’s “knowing inducement” of breach); *John Paul Mitchell Sys. v. Randalls Food Mkts.*, 17 S.W.3d 721, 731 (Tex. App.—Austin 2000, pet. dismissed w.o.j.) (overturning jury verdict where there was no evidence the defendant “persuaded anyone” to breach); *Davis v. HydPro, Inc.*, 839 S.W.2d 137, 139 (Tex. App.—Eastland 1992, writ denied) (plaintiff must show defendant “took an active part in persuading a party to a contract to breach it.”)).

93. 188 S.W.3d 296 (Tex. App.—Waco 2006, pet. denied).

94. *Id.* at 299.

Johnson was fired from his probationary status with the other airline. Johnson brought a variety of claims against Baylor, including claims for tortious interference with his prospective relationship with the airline.<sup>95</sup>

The Waco Court of Appeals followed a Dallas Court of Appeals decision, in turn following a decision of the Texas Supreme Court, that the tortious conduct must

constitute a cause in fact that prevented the prospective business relationship from coming to fruition in the form of a contractual agreement. The test for cause in fact, or 'but for causation,' is whether the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.'<sup>96</sup>

In this case, the court of appeals concluded that there was "more than a scintilla" of evidence that a "cause in fact of [the airline's] dismissal of Johnson was the misrepresentation and information that [it] received from Baylor about Johnson's personnel records. There [was] some evidence that Baylor's misrepresentation about Johnson's personnel records was a substantial factor in [the airline's] dismissal of Johnson."<sup>97</sup> This evidence was "Johnson's affidavit testimony that [the airline's] decision to dismiss [him] was based on the records and information that Baylor did, and did not, furnish" to the airline, combined with applicable provisions of a federal law requiring that pilot personnel records going back five years be readily available to prospective employers, and "the undisputed fact that Baylor misrepresented to [the airline] that Johnson's records were not readily available."<sup>98</sup> Interestingly, the court of appeals also addressed the issue of "malice" as an element of tortious interference with prospective contracts and correctly held that it is not such an element, but it did so without citing *Sturges*, instead citing *Ash v. Hack Branch Distributing Co.*<sup>99</sup>

#### IV. LANHAM ACT SECTION 43(A) AND FALSE DESIGNATIONS OF ORIGIN

##### A. PATENT MIS-MARKING ONLY ACTIONABLE UNDER § 43(A) IF DONE IN BAD FAITH

In *DP Wagner Manufacturing, Inc. v. Pro Patch Systems, Inc.*,<sup>100</sup> in connection with a motion in limine heard shortly before trial, the United States District Court for the Southern District of Texas considered whether patent "mis-marking" of a product (that is, marking a product to

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95. *Id.* at 299–300.

96. *Id.* at 304 (quoting *COC Servs., Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 679 (Tex. App.—Dallas 2004, pet. denied) (quoting *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995))).

97. *Johnson*, 188 S.W.3d at 306.

98. *Id.*

99. *Id.* at 307 (citing *Ash v. Hack Branch Distrib. Co.*, 54 S.W.3d 401, 414–15 (Tex. App.—Waco 2001, pet. denied).

100. 434 F. Supp. 2d 445 (S.D. Tex. 2006).

indicate it is covered by patents that do not apply to it) could constitute false advertising under Section 43(a) of the Lanham Act and unfair competition under Texas law.<sup>101</sup> The plaintiff claimed that this “mis-marking” could constitute a false representation or description under Section 43(a), and that in turn would constitute a wrongful act sufficient to support a cause of action for common-law unfair competition. The defendant replied that, since the claim was based entirely on a provision of the Patent Act relating to proper and improper marking, it was entirely preempted by the Patent Act, and no Lanham Act or state law claim could lie.<sup>102</sup>

The district court generally agreed, following the Federal Circuit’s holdings that “federal patent law bars the imposition of liability for publicizing a patent in the marketplace,” but noted particularly the important exception: “unless the plaintiff can show that the patent holder acted in bad faith.”<sup>103</sup> Significantly, the district court noted that *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, and two other cases of similar import involved state law claims and Lanham Act claims premised on a patent holder’s demand letters to alleged infringers and their customers, warning about potential litigation.<sup>104</sup> Those cases all held that in order to avoid preemption, bad faith must be alleged and proven, even if bad faith is not otherwise required under the cause of action. The district court concluded that the same bad faith requirement should apply to both Lanham Act and state law claims based on mis-marking as it applies to demand letters and similar communications to customers based on patent claims.<sup>105</sup>

Quoting *Zenith*, the district court explained that, while “[e]xactly what constitutes bad faith [is] to be determined on a case by case basis,” where a ‘patentee knows that the patent is invalid, unenforceable, or not infringing, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representation is made out.’”<sup>106</sup> The district court warned that if the defendant had, as alleged, “marked its products with inapplicable patents despite knowing that those patents did

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101. The elements of a § 43(a) false advertising claim, 15 U.S.C. § 1125(a), are:

(1) that the defendant has made a false or misleading statement of fact concerning his product or another’s; (2) that the statement actually or tends to deceive a substantial portion of the intended audience; (3) that the statement is material in that it is likely to influence purchasing decisions; (4) that the product traveled in interstate commerce; and (5) that there is likelihood of injury to the plaintiff in terms of declining sales, loss of goodwill, etc.

*Id.* at 460 n.2 (citing *Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 462 (5th Cir. 2001)).

102. *Id.* at 458–59.

103. *Id.* at 460 (quoting *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1336 (Fed. Cir. 1998), *rev’d in part on other grounds*, *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999)).

104. *Id.* at 461 (citing *Hunter Douglas*, 153 F.3d at 1318; *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340 (Fed. Cir. 1999) and *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367 (Fed. Cir. 2004)).

105. *Id.* at 461.

106. *Id.* at 461 (quoting *Zenith*, 182 F.3d at 1354).



not cover the marked products, [s]uch conduct, if true, would be evidence of bad faith.”<sup>107</sup> In a different case last year, the same court held that to satisfy the “bad faith” standard in the context of an assertion of patent infringement, a plaintiff must establish that the patent holder’s assertions of infringement are “objectively baseless,” meaning that “no reasonable litigant could realistically expect success on the merits.”<sup>108</sup>

#### B. NO HARM, NO RECOVERY

*Berg v. Symons*<sup>109</sup> illustrated the familiar principle that if a Section 43(a) plaintiff can only show that a statement is misleading or ambiguous, he must prove actual deception, either through direct evidence of consumer reactions to the advertisement or evidence of consumer surveys or consumer-reaction tests. A silversmith’s ex-wife wrote to her customers, introducing her new business. The silversmith complained, contending the letters created the perception that he had gone out of business. The United States District Court for the Southern District of Texas held that the letters did not constitute false advertising absent a showing that the silversmith had been injured as a result of the letters.<sup>110</sup>

The United States District Court for the Eastern District of Texas in *Stewart Family Funeral Home, Ltd. v. Funeral Directors’ Life Insurance Co.*<sup>111</sup> reached a similar result. A funeral home complained of statements made, by a provider of pre-need funeral contracts, to the effect that its pre-need funeral contracts were freely transferable to funeral homes other than those selling the contracts. Injunctive relief was denied, partly because the provider quit making the statements at issue, and also because an injunction would not have clarified the transferability of contracts that had already been purchased.<sup>112</sup>

### V. NONCOMPETITION COVENANTS

#### A. *Sheshunoff*: Texas Supreme Court Clarifies “At The Time”

When the Texas Supreme Court issued *Alex Sheshunoff Management Services, L.P. v. Johnson*,<sup>113</sup> it resolved a twelve-year split of authority among Texas courts over what it would take to show the enforceability of non-compete covenants in employment agreements.

Since the supreme court’s 1994 holding in *Light v. Centel Cellular Co. of Texas*,<sup>114</sup> Texas courts and employers had engaged in a raging debate over when the employer had to disclose confidential information in consideration for an at-will employee’s agreement not to compete. The issue

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107. *Id.*

108. *Sanitec Indus.*, 2006 U.S. Dist. LEXIS 36460, at \*18 n.4.

109. 393 F. Supp. 2d 525 (S.D. Tex. 2005).

110. *Id.* at 560.

111. 410 F. Supp. 2d 514 (E.D. Tex. 2006).

112. *Id.* at 518.

113. 209 S.W.3d 644 (Tex. 2006).

114. 883 S.W.2d 642 (Tex. 1994).

turned on the proper interpretation of one portion of the statute governing non-competition covenants, which provides, in part, that in order to be enforceable, the covenant must be “ancillary to or part of an otherwise enforceable agreement *at the time the agreement is made*.”<sup>115</sup> As the Austin Court of Appeals required in *Sheshunoff*, many appellate courts held that in order for the non-competition covenant to be enforceable, the employer had to disclose confidential information to the employee at the same time as the employee signed the covenant, typically at the beginning of employment.<sup>116</sup> Other courts, and employers, found this interpretation of the “at the time the agreement is made” language in section 15.50 of the Texas Business & Commerce Code impractical. Naturally, they argued that an employer provides confidential information on an as-needed basis, and particularly once an employee develops some track record at the company and establishes his or her trustworthiness with the company’s trade secrets. Because most companies could not rationalize setting up a transmission of confidential information contemporaneously with the employee signing the agreement, employers in appellate districts giving this application to Section 15.50 had few practicable ways of keeping employees from immediately going to work for the competition.

Resolving this issue in *Sheshunoff*, the supreme court held that “an at-will employee’s non-compete covenant becomes enforceable *when* the employer performs the promises it made in exchange for the covenant,” such that the information need not be provided simultaneously with the execution of the agreement.<sup>117</sup> Rather, like a unilateral promise which becomes enforceable upon performance, the non-competition covenant becomes enforceable when the employer fulfills its promise to provide confidential information.

Under the supreme court’s holding, it appears that a non-compete covenant will become enforceable whenever the promise is fulfilled, whether contemporaneous with the execution of the agreement or several years later, as long as the employee is still employed by the employer. The concurring justices to the opinion would have limited how long the employer could take before fulfilling its promise—that the confidential information must be provided within a “reasonable” period after execution of the non-compete agreement, for example, reasoning that when “parties omit an express stipulation as to time,” a reasonable time period will be assumed under contract principles.<sup>118</sup> The concurrence further warned that by not imposing a time limit on the employer’s performance, an employer may withhold confidential information unless and until it suspects the employee will leave his job for the competition.<sup>119</sup>

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115. TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon 2007) (emphasis added).

116. *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 124 S.W.3d 678, 687 (Tex. App.—Austin 2003), *aff’d in part, rev’d in part* by 209 S.W.3d 644 (Tex. 2006).

117. *Sheshunoff*, 209 S.W.3d at 646 (emphasis added).

118. *Id.* at 661 (Jefferson, J., concurring)

119. *Id.* at 662 (Jefferson, J., concurring).

B. "SATISFACTION," AT WILL EMPLOYMENT,  
AND ILLUSORY COMMITMENTS

In *Pearson v. Visual Innovations Co.*,<sup>120</sup> Mr. Pearson claimed he was an at will employee and, as such, any promise made by his former employer was illusory.<sup>121</sup> However, his employment agreement provided that his employment would continue for six months "subject to termination as set forth below," and, thereafter, his employer could terminate him if he "failed to perform to the satisfaction of the [e]mployer in the [e]mployer's sole discretion."<sup>122</sup> The Austin Court of Appeals drew this distinction between an "at will" agreement and one allowing the employer to terminate the employee if it determined the employee's performance was "unsatisfactory."<sup>123</sup> The court of appeals concluded that his former employer's "promises to provide Pearson confidential and proprietary information, specialized training, and stock ownership were not illusory because . . . [the employer] was bound to employ [him] for at least six months unless his performance was unsatisfactory."<sup>124</sup>

C. EQUITABLE EXTENSION OF COVENANT NOT TO COMPETE

In *RenewData Corp. v. Strickler*,<sup>125</sup> the Austin Court of Appeals considered whether the district court erred in refusing to extend a non-competition period beyond its original term. The court of appeals concluded that it was empowered to craft an injunction that would extend beyond the facial term of the covenant but declined to do so in this case, since, by requesting certain extensions of time from the trial court, the movant had been responsible for the delay (as opposed to having delays "inherent to litigation").<sup>126</sup>

VI. COMMON-LAW UNFAIR COMPETITION

*RTLAC AG Products, Inc. v. Treatment Equipment Co.*<sup>127</sup> confirmed the familiar principle that unfair competition is a derivative tort, and "[w]ithout some finding of an independent substantive tort or other illegal conduct, liability cannot be premised on the tort of 'unfair competition.'"<sup>128</sup> Interestingly, however, the Dallas Court of Appeals also asserted that "to prevail on an unfair competition claim, a plaintiff must establish two elements: (1) the plaintiff's trade name has acquired a sec-

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120. No. 03-04-00563-CV, 2006 Tex. App. LEXIS 2795 (Tex. App.—Austin Apr. 6, 2006, pet. denied).

121. *Id.* at \*14.

122. *Id.*

123. *Id.* (citing *Zep Mfg. Co. v. Harthcock & Panther Indus., Inc.*, 824 S.W.2d 654, 659 (Tex. App.—Dallas 1992, no writ)).

124. *Id.* at \*18.

125. No. 03-05-00273-CV, 2006 WL 504998 (Tex. App.—Austin Mar. 3, 2006, no pet.) (mem. op., not designated for publication).

126. *Id.* at \*5 (citing *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003)).

127. 195 S.W.3d 824 (Tex. App.—Dallas 2006, no pet.).

128. *Id.* at 833.

ondary meaning through usage; and (2) the similarity of the name used by the defendant would likely confuse the public.”<sup>129</sup> These cases reflect the traditional view that “unfair competition” refers to “passing off” one’s goods or services as those of another, but, in recent times, the tort has generally been read to extend beyond common law trademark infringement and to encompass virtually any actionable business tort.<sup>130</sup> While the court’s statement that unfair competition may be shown in a passing-off context is certainly correct, it is not the only way in which unfair competition may be shown, and thus the court’s statement should not be read in a limiting fashion.

## VII. FRAUD AND NEGLIGENT MISREPRESENTATION

### A. FRAUDULENT STATEMENT MUST BE CLEAR, NOT AMBIGUOUS

In *Dardas v. Fleming, Hovenkamp & Grayson, P.C.*,<sup>131</sup> two groups of attorneys disputed the proper distribution of attorneys’ fees arising from class-action litigation. As an alternative argument, the plaintiffs argued that if the Houston Court of Appeals for the Fourteenth District determined that one of the contracts between the two groups covered fewer than all of the cases in which the plaintiffs were involved, then a genuine fact issue would exist as to whether the plaintiffs had been defrauded or suffered a fraud in the inducement.<sup>132</sup>

The court of appeals held, however, that it did not interpret the contract that way.<sup>133</sup> In fact, the court of appeals held that it was ambiguous whether the contract at issue covered all of such cases.<sup>134</sup> Accordingly, the “condition” in the “conditional argument” of the plaintiffs did not occur, and there was no argument properly before the court.<sup>135</sup> In an interesting footnote, the court of appeals added that even if it assumed that one of the defendants’ attorneys had represented that the attorneys’ fees were “truly for the production of the idea,” it would “not be reasonable to infer from this remark” the representation the plaintiffs wished to construe.<sup>136</sup>

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129. *Id.* (citing *Associated Tel. Directory Publishers, Inc. v. Five D’s Publ’g Co.*, 849 S.W.2d 894, 898 (Tex. App.—Austin 1993, no writ); *Hudgens v. Goen*, 673 S.W.2d 420, 423 (Tex. App.—Fort Worth 1984, writ ref’d n.r.e.)).

130. *See Taylor Publ’g Co. v. Jostens, Inc.*, 216 F.3d 465, 486 (5th Cir. 2000) (“Unfair competition under Texas law ‘is the umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters.’”) (quoting *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 14 (5th Cir. 1974)).

131. 194 S.W.3d 603 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

132. *Id.* at 619.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 619 n.6.

## B. "REASONABLE" RELIANCE IN A LITIGATION CONTEXT

It is understood that in order for a plaintiff successfully to bring claims of fraud, negligent misrepresentation, or promissory estoppel, the plaintiff must show that she relied on the defendant's statements.<sup>137</sup> It is further understood that this reliance must be reasonable and justified.<sup>138</sup> What is "reasonable and justified" in particular circumstances, however, may be more circumspect.

In *Ortiz v. Collins*,<sup>139</sup> the defendants purchased a townhome at a trustee's foreclosure sale. Ortiz, however, the previous owner, tenaciously clung to the townhome despite the foreclosure and a subsequent forcible detainer judgment, forcing the defendants to file a second forcible detainer action. While it was proceeding, Ortiz and the defendants engaged in certain discussions. Ortiz claimed the defendants said they would sell the townhome back to him for \$10,000 more than they had paid at the foreclosure sale and would draw up and forward to him a contract to that effect. The defendants did not prepare such a contract, refused to sign the one Ortiz prepared, and executed a writ of possession giving Ortiz twenty-four hours to leave. Ortiz claimed the defendants had defrauded him, or made negligent misrepresentations, and were bound by the doctrine of promissory estoppel. The defendants responded that, as a matter of law, reliance on any alleged misrepresentations by them could not be justified in this case because any such representations were made in an adversarial context.<sup>140</sup>

Both the trial court and the Houston Court of Appeals for the Fourteenth District agreed with the defendant.<sup>141</sup> The court of appeals explained that, "[g]enerally, reliance on representations made in a business or commercial transaction is not justified when the representation takes place in an adversarial context, such as litigation."<sup>142</sup> Ortiz argued that "the fact that the fraudulent conduct may have occurred in the context of litigation does not shield one from liability"<sup>143</sup> and cited *Querner v. Rindfuss*<sup>144</sup> and *Likover v. Sunflower Terrace II, Ltd.*<sup>145</sup> But the majority viewed those cases as merely confirming that an attorney is not automati-

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137. See *Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 647, 651, 654 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

138. See *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997).

139. 203 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

140. *Id.* at 418–19, 422.

141. *Id.* at 422.

142. *Id.* (citing *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999); *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 443 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Coastal Bank SSB v. Chase Bank of Tex., N.A.*, 135 S.W.3d 840, 843 (Tex. App.—Houston [1st Dist.] 2004, no pet.)) ("A party to an arm's length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests, and a failure to do so is not excused by mere confidence in the honesty and integrity of the other party.")

143. *Id.* at 422 n.5.

144. 966 S.W.2d 661, 666 (Tex. App.—San Antonio 1998, pet. denied).

145. 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ).

cally immune from suit for fraud by a non-client.<sup>146</sup>

In an interesting twist, Ortiz argued that the relationship no longer *was* adversarial because the parties had reached a settlement—namely, that the townhome would be sold back to him. The court of appeals followed *McCamish* in holding that; “in determining whether a relationship is adversarial, courts should look to the relationship of the parties and the extent to which their interests are aligned.”<sup>147</sup> The court of appeals held that, here, the parties’ relationship remained adversarial, so any such reliance was unreasonable.<sup>148</sup>

In an interesting concurring opinion by Justice Mirabal (concurring in the result only), she would have decided it much more simply: the plaintiff alleged a settlement agreement, which must be in writing to be enforceable, and so it could not be reasonably relied upon by either side.<sup>149</sup> In an interesting footnote, Justice Mirabal indicated she also disagreed with the majority’s reliance on *McCamish*, *Coastal Bank*, and *Chapman*. She drew a distinction between these three cases, which involved what she described as “evaluative types of misrepresentations,” such as statements about the quality of a bank’s history, an opinion that certain trusts were guilty of tortious interference, or statements about past actions in the process of giving guidance, and cases (such as this one) that involved alleged agreements by an attorney to act or refrain from acting in the future.<sup>150</sup> She believed that if the alleged agreements in the present case had been reduced to writing, the majority would still hold reliance on them to be unjustifiable because they occurred in the context of litigation.<sup>151</sup> Justice Mirabal did not clarify whether she would have held reliance on them justified if these statements had only been reduced to writing as required to be enforceable, but it appears she would have so held, perhaps—but not certainly—inferring that in that event, the parties’ written agreement would have shown their interests to have become “aligned.”

### C. DUTY TO DISCLOSE IN ARMS-LENGTH TRANSACTIONS

According to the Texas Supreme Court, “[a]s a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information.”<sup>152</sup> Such a duty can arise from a formal fiduciary relationship, or where there is a confidential relationship between the parties, but may also arise in arms-length transactions in at least three other situations: (1) “when one voluntarily discloses information, he has

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146. *Ortiz*, 203 S.W.3d at 422 n.5.

147. *Id.* at 422 (citing *McCamish*, 991 S.W.2d at 794).

148. *Id.*

149. *Id.* at 427 (Mirabal, J., concurring) (citing *Padilla v. LaFrance*, 907 S.W.2d 454, 459–61 (Tex. 1995)).

150. *Id.* at 427 n.1 (Mirabal, J., concurring).

151. *Id.* (Mirabal, J., concurring).

152. *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001).

a duty to tell the whole truth;"<sup>153</sup> (2) "when one makes a representation, he has a duty to disclose new information when the new information makes the earlier representation misleading or untrue;"<sup>154</sup> and (3) "when one makes a partial disclosure and conveys a false impression, he has the duty to speak."<sup>155</sup>

In *Playboy Enterprises, Inc. v. Editorial Caballero, S.A. de C.V.*,<sup>156</sup> Editorial Caballero, acting under license from Playboy, published a Spanish language version of Playboy magazine in Mexico. Editorial Caballero also had the right, with Playboy's approval, to publish a Spanish language version of Playboy in the United States. But Playboy terminated the license agreement after about a year. The claims of Editorial Caballero and its assignee for fraud, based on oral representations that Playboy would automatically renew the agreement, would not terminate it, would be "partners," and so forth, were directly contradicted by the express terms of the agreement and so could not be relied on, as a matter of law.<sup>157</sup>

Editorial Caballero complained as much about what Playboy did *not* say as what it did. Editorial Caballero complained that while the Playboy executives with whom it was negotiating were generally positive and encouraging about bringing the Spanish language version of Playboy to the United States, Playboy founder Hugh Hefner was not. In internal memos and meetings with Playboy executives, Hefner agreed only that the licensee might publish an exact duplicate of the U.S. magazine which could therefore be included in the U.S. magazine's circulation numbers and rate base. But, with "much of the celebrity pictorial and centerfold content the same in each issue,"<sup>158</sup> Hefner was gravely concerned that distributing thousands of copies of a Mexican edition in the United States would cut into, or "cannibalize," the U.S. magazine's circulation.<sup>159</sup> Though Hefner was ostensibly no longer in charge of daily operations, he still owned seventy percent of the stock<sup>160</sup> and was a major presence in the business.

Playboy's concerns about the cannibalizing issue were conveyed "in general terms" to the licensees, but it appears that Playboy did not disclose Hefner's specific concerns about cannibalizing U.S. sales nor his instructions regarding the publication of the Spanish language edition for U.S. distribution. In these circumstances, the Corpus Christi Court of

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153. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 941 S.W.2d 138, 146-47 (Tex. App.—Corpus Christi 1995) (per curiam), *rev'd on other grounds*, 960 S.W.2d 41, 44 (Tex. 1998).

154. *Id.*

155. *Id.*

156. 202 S.W.3d 250 (Tex. App.—Corpus Christi 2006, pet. denied).

157. *Id.* at 257-59.

158. Mr. Hefner is known to believe the language of Playboy is nearly universal, but his comment raises the familiar question of whether anyone reads Playboy for the articles, whatever the language.

159. *Id.* at 261-63.

160. *Id.* at 259.

Appeals concluded that the evidence did support a duty on Playboy's part to disclose Hefner's position on these matters because, without it, the information relayed to the licensees "was not the whole truth, was misleading, or conveyed a false impression."<sup>161</sup> The facts that Hefner was expressing those concerns and obligations openly and vigorously inside Playboy while the license discussions were going on, and that this was well known by the Playboy executives involved in those discussions, may have been determinative. Perhaps the outcome would have been different had Hefner not expressed himself so clearly at the time or had the executives not realized the full extent and significance of his views until after the deal had already been reached.

The facts in *Playboy* should be contrasted with those in *Clover Staffing, LLC v. Johnson Controls World Services Inc.*<sup>162</sup> The plaintiff claimed to have formed a "misunderstanding" about the existence of a certain rebate program because the defendant gave another customer a list of "preferred providers," some with which the defendant had a rebate arrangement. The plaintiff claimed that this kind of "partial disclosure" was confusing and led to a costly "misunderstanding," which the defendant, having disclosed in part, was duty-bound to correct.<sup>163</sup>

In *Clover Staffing*, the United States District Court for the Southern District of Texas recited the familiar list of circumstances which might give rise to a duty to disclose, including a "partial disclosure," but it found no evidence to support an inference that such a duty should be found on these facts.<sup>164</sup> The district court did find that, in fact, there was no rebate program actually in effect during the relevant period.<sup>165</sup> This finding may have played a larger role in the decision than the opinion might indicate on its face. But perhaps the district court's most significant reason was that the defendant did not make an affirmative statement about the rebate program directly to the plaintiff.<sup>166</sup> The allegedly misleading statement was made to another customer, not to the plaintiff, and this was not enough to warrant imposition of a duty to correct the "misunderstanding" the plaintiff claimed ensued.<sup>167</sup>

## VIII. CONSPIRACY

*Ortiz v. Collins*<sup>168</sup> and *RTLAC AG Products, Inc. v. Treatment Equipment Co.*<sup>169</sup> confirmed the understood principle that conspiracy is not an independent cause of action but is a derivative tort that requires an un-

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161. *Id.* at 263.

162. No. H-03-1251, 2006 U.S. Dist. LEXIS 30990 (S.D. Tex. Apr. 18, 2006).

163. *Id.* at \*4.

164. *Id.* at \*5.

165. *Id.*

166. *Id.*

167. *Id.* at \*4-5.

168. 203 S.W.3d 414, 422-23 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

169. 195 S.W.3d 824, 833 (Tex. App.—Dallas 2006, no pet.).



derlying tort.<sup>170</sup> In both cases, where no underlying tort was found, no claim of conspiracy could lie either.

## IX. FIDUCIARY DUTIES AND IMPLIED TERMS OF GOOD FAITH

### A. IMPLY TERMS ONLY WHEN "NECESSARY" TO CARRY OUT PARTIES' INTENTIONS

Claims that a contracting party is now acting unfairly often sound much like business tort claims and are often accompanied by familiar business tort claims, like tortious interference, breach of fiduciary duty, and fraudulent inducement. In *Clovis Corp. v. Lubbock National Bank*,<sup>171</sup> the plaintiff unsuccessfully attempted to read into a written contract an implied term of good faith. This contract appears to have been a factoring agreement. Under this agreement, the lender would advance to the borrower a percentage of the face amount of the borrower's accounts receivable but would "reserve" a certain amount against the risk of nonpayment by the underlying customer. The amount of "reserve" was set according to how the lender judged the risk that the receivable would not be paid. In this case, the agreement allowed the lender to increase the "reserve" from time to time, "when deemed necessary by [lender]."<sup>172</sup> Aggrieved, the lender found it "necessary" to increase the reserve, and the borrower argued that the contract must be read to include an implied term obligating the lender not to raise the rate unless it did so in good faith.<sup>173</sup>

The Amarillo Court of Appeals noted the Texas Supreme Court's view that "in 'rare circumstances, . . . a court may imply a covenant in order to reflect the parties' real intentions.'"<sup>174</sup> But the court of appeals also noted that the Texas Supreme Court had further held that such terms "will not be implied simply to make a contract fair, wise, or just."<sup>175</sup> Terms will only be implied "when there is a satisfactory basis in the express contract[. . .] which makes it necessary to imply duties and obligations . . . to effect the purposes of the parties in the contract."<sup>176</sup> The court of appeals spoke in general terms of when a term might or might not be implied in a contract. The court of appeals could have noted, but did not, that covenants of good faith and fair dealing have not historically been implied in contracts governed by Texas law, except in cases involving special relationships or arising under the Uniform Commercial Code. In Texas, "[t]here is no general duty of good faith and fair dealing in

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170. See *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996).

171. 194 S.W.3d 716 (Tex. App.—Amarillo 2006, no pet.).

172. *Id.* at 718–19.

173. *Id.* at 719.

174. *Id.* (quoting *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 747 (Tex. 2003)).

175. *Id.* (quoting *Universal Health Servs.*, 121 S.W.3d at 747–48 (citations omitted)).

176. *Id.* (quoting *Universal Health Servs.*, 121 S.W.3d at 747–48).

ordinary, arms-length commercial transactions.”<sup>177</sup> In a memorable phrase, the court of appeals noted that “necessity is the triggering agent” of when a term might be implied—necessary, that is, in order to effect what was already the satisfactorily evident intent of the parties.<sup>178</sup>

In this case, nothing was said in the contract about acting in good faith. In fact, the parties had expressly agreed that the lender could raise the reserve whenever it deemed it “necessary.” The word “necessity” thus arises twice. The holding, basically, is that a term not already found in the four corners of a document will not be read into it, unless it is “necessary” to do so in order to carry out the intent of the parties which already appears from their agreement.<sup>179</sup> The facts of this particular case show that the parties agreed the lender could raise the reserve whenever the lender felt it “necessary” to do so. Since “necessary”—in the lender’s view—was already the standard agreed upon in this contract for raising the reserve, it was not “necessary” as a matter of law to imply an additional term to carry out the parties’ intentions.<sup>180</sup>

#### B. IN BUSINESS TRANSACTIONS, TRUSTING RELATIONSHIPS MUST ALREADY EXIST

Fiduciary duties may arise as a matter of law from certain formal relationships or may arise out of informal relationships when “one person trusts in and relies on another, whether the relation[ship] is a moral, social, domestic, or purely personal one [. . .] but not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship.”<sup>181</sup>

Relying on *Schlumberger*, the 2006 case of *Dardas v. Fleming, Hovenkamp & Grayson, P.C.*<sup>182</sup> reminds us that “Texas courts do not create such a duty lightly.”<sup>183</sup> Here, a dispute arose between two groups of attorneys over entitlement to attorneys’ fees in class-action litigation. The Houston Court of Appeals for the Fourteenth District held that in order to impose such a duty arising from a relationship in a business transaction, “the relationship must exist prior to, and apart from, the agreement made the basis of the suit.”<sup>184</sup> Here, there was no evidence of any prior fiduciary relationship between or among the two groups of attorneys, so, as a matter of law, the defendants did not owe the plaintiffs a fiduciary duty.<sup>185</sup>

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177. *Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 52 (Tex. 1998).

178. *Clovis Corp.*, 194 S.W.3d at 719.

179. *Id.*

180. *Id.*

181. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997).

182. 194 S.W.3d 603 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

183. *Id.* at 620.

184. *Id.*

185. *Id.*

## X. REMEDIES

## A. RETRACTION AND APOLOGY

In *Billing Concepts, Inc. v. OCMC, Inc.*,<sup>186</sup> a federal Magistrate Judge considered a motion to remand a diversity case removed from state court on the ground that the amount in controversy fell short of the \$75,000 statutory minimum. The federal Magistrate Judge found it was not “facially apparent” that the value of the injury alleged was likely to exceed \$75,000. In its motion to remand, the plaintiff expressly waived damages in excess of that amount, so the United States District Court for the Western District of Texas recommended the case be remanded.<sup>187</sup> The most interesting part of the opinion, however, concerned the recital of the terms of the *ex parte* temporary restraining order (“TRO”) the state district judge had entered before the case was removed—and which perhaps played a significant role in motivating the defendant to try removing the case in the first place.

In this business disparagement and tortious interference case, the defendant allegedly sent out a “single, one-time communication to plaintiff’s customers. . . improperly characteriz[ing] plaintiff’s financial situation.”<sup>188</sup> In an *ex parte* order, the district court entered what was likely an order drafted by the plaintiff requiring the defendant, within three days of receiving the TRO, to provide the plaintiff with (1) a list of everyone who received a copy of the communication attached as an exhibit to the TRO; (2) a *written retraction and apology* regarding the *communications* specified on the exhibit; and (3) a hard copy of all communications “similar” to what the defendant made.<sup>189</sup> The district court also enjoined the defendant from further disseminating the contents of the exhibit, or any false or misleading statement about the plaintiff and its affiliates.<sup>190</sup>

The district court noted, with a disapproving tone but without further direct comment, that the order had been sought and obtained on an *ex parte* basis, despite the fact that the plaintiff’s counsel had contact information for the defendant and its counsel, due to pending litigation between them in federal court in Indiana.<sup>191</sup> The district court did not address the substance of the matter further.

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186. No. SA-05-CA-1084 FB (NN), 2006 U.S. Dist. LEXIS 39269 (W.D. Tex. June 8, 2006).

187. *Id.* at \*17–18, \*22.

188. *Id.* at \*17.

189. *Id.* at \*4 (emphasis added).

190. *Id.* at \*5.

191. *Id.*

B. TO BE ENFORCEABLE BY CONTEMPT, INJUNCTION  
MUST NOT BE VAGUE

*Houston v. Millenium Insurance Agency, Inc.*<sup>192</sup> posed, in an interesting setting, for the familiar principle that in order to be enforceable by contempt, an injunction must be clear in its terms. The dispute arose when members of an insurance company had a falling out. Several members, fearing they were about to be fired, removed certain files from the office, resigned, and opened their own office. In the litigation that ensued, the trial court issued a temporary injunction, ordering them to return the disputed files. When all the files were not returned, the trial court signed a contempt judgment, fined Houston \$500, sentenced him to three days in jail, and ordered him held until certain documents were produced.<sup>193</sup> The Corpus Christi Court of Appeals promptly granted interim relief and, a few months later, overturned the contempt judgment, finding: that the original injunction was “vague in its description of what [the defendant] was required to produce;” that neither it nor the show-cause motion “described the specific documents that [he was] alleged to have failed to return;” and that the show cause notice neither “advise[d] [Houston] of the specific acts of contempt [or] . . . that criminal confinement and a criminal penalty would be sought as punishment.”<sup>194</sup>

Meanwhile, however—during the few months while the contempt appeal was pending, and before the court of appeals had issued its decision—the underlying dispute was tried on the merits in the trial court. At the time of trial, the contempt judgment was not void. The trial court, therefore, allowed opposing counsel to bring up the contempt judgment during cross-examination of Houston—including the fact that he had been sent to jail for it—and to urge in closing arguments that Houston was so determined to cause the former agency harm that he was willing to disobey the trial court’s orders and go to jail.<sup>195</sup> The final judgment which ensued was appealed to the First Court of Appeals, rather than the Fourteenth.<sup>196</sup>

On appeal, the former agency argued that Houston knew perfectly well what was required of him, as it had been made clear to him orally during pre-trial hearings, so that his failure to comply with those expectations was “probative of his malicious intent and should be admissible regardless of the ultimate disposition of the [contempt] judgment.”<sup>197</sup> The court of appeals disagreed, noting that the possibility that a conviction might be declared void on appeal, “thereby altering its legal effect and probative value, is the very reason that [Texas Rule of Evidence] 609(e) prevents its

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192. No. 13-03-00235-CV, 2006 Tex. App. LEXIS 3156 (Tex. App.—Corpus Christi 2006, pet. denied) (mem. op.).

193. *Id.* at \*2–3.

194. *Id.* at \*3, \*8–9 (quoting *In re Houston*, 92 S.W.3d 870, 875, 877 (Tex. App.—Houston [14th Dist.] 2002, no pet.)).

195. *Id.* at \*4, \*8.

196. *Id.* at \*4, \*8.

197. *Id.* at \*8.

admission in the first place.”<sup>198</sup> Once the conviction was held void, it was not relevant to any issue in the proceedings, and the court of appeals held that since the discussion established clearly to the jury that the trial judge “had already chosen to punish Houston for some of the very actions they were being asked to evaluate,” the error in allowing its admission probably resulted in an improper judgment.<sup>199</sup> The court of appeals noted that while “comments on the weight of the evidence can take many forms [and] admitted evidence should not indicate the opinion of the trial judge,”<sup>200</sup> it was significant that in the context of a jury trial, “the influence of the trial judge on the jury is necessarily and properly of great weight, and [his] lightest word or intimation is received with deference and may prove controlling.”<sup>201</sup>

### C. RECOVERING ATTORNEYS’ FEES FOR A TORT

The principle that attorneys’ fees are not recoverable for tort claims (absent statutory authority) is as well known as the saying, “good fences make good neighbors.” Both of these truisms were invoked in *Wilén v. Falkenstein*.<sup>202</sup> Two neighbors in an upscale subdivision fell into a dispute over a pair of two matching trees that Falkenstein had planted on either side of his pool. Wilén complained that one of the trees blocked his balcony view of the subdivision’s clubhouse and offered to have his own tree service cut it back. Falkenstein refused, however, saying he would look after his own trees. Later, while Falkenstein was away on vacation, Wilén had his tree service come to cut back his own trees. When the service asked Wilén which trees needed to be cut back, he pointed to the one by Falkenstein’s pool, and when he was asked how much to trim it, he told the maintenance serviceman to go up to his balcony and take a look. In Falkenstein’s opinion, the tree was consequently “butchered,” looked “like a table top,” and could not be restored. The jury awarded actual and exemplary damages, plus attorneys’ fees.<sup>203</sup>

The Fort Worth Court of Appeals affirmed all but the attorneys’ fees award, citing the familiar rule that attorneys’ fees are not generally recoverable in tort actions.<sup>204</sup> The court of appeals, however, also discussed two possible exceptions to this rule.

The first exception applies “‘where the defendant’s tort requires the plaintiff to act in the protection of his interests by bringing or defending an action against a third party,’” in which event the plaintiff may recover for the “‘reasonably necessary loss of time, attorney fees and other ex-

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198. *Id.* at \*9 (citations omitted).

199. *Id.* at \*12.

200. *Id.* at \*11 (citing *Ex rel. M.S.*, 115 S.W.3d 534, 538 (Tex. 2003)).

201. *Id.* at \*11 (quoting *Blue v. State*, 41 S.W.3d 129, 131 (Tex. Crim. App. 2000) (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894))).

202. 191 S.W.3d 791 (Tex. App.—Fort Worth 2006, pet. denied).

203. *Id.* at 795–96.

204. *Id.* at 804 (citing *New Amsterdam Cas. Co. v. Tex. Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967)).

penditures thereby suffered or incurred.’’<sup>205</sup> This exception did not apply in this case because Falkenstein did not sue a third party.<sup>206</sup>

The second exception may permit recovery of attorneys’ fees arising from tort claims where “the defendant ‘has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’”<sup>207</sup> The Texas Supreme Court has held that “recovery of attorney’s fees for these reasons should be pursued [as a sanction] under rule of civil procedure 13, not as actual damages.”<sup>208</sup> Falkenstein did not seek recovery of attorneys’ fees as a sanction, and attorneys’ fees were not authorized by statute or contract, so no recovery for attorney’s fees could be had.<sup>209</sup>

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205. *Id.* at 805 (quoting *Qwest Commc’ns Int’l, Inc. v. AT&T Corp.*, 114 S.W.3d 15, 33 (Tex. App.—Austin 2003), *rev’d in part on other grounds*, 167 S.W.3d 324 (Tex. 2005)).

206. *Id.*

207. *Id.* (quoting *Quest*, 114 S.W.3d at 33).

208. *Id.* (citing *McCall v. Tana Oil & Gas Corp.*, 104 S.W.3d 80 (Tex. 2003)).

209. *Id.*

